[Reprinted from Harpers' Magazine for October, 1873, by Permission.]

THE JUDICIAL RECORD

OF THE LATE

CHIEF JUSTICE CHASE.

By JOHN S. BENSON,
COUNSELLOR AT LAW.

"To be, and not to seem, is this man's maxim;
His mind reposes on its proper wisdom,
And wants no other praise ——."
ÆSCHYLUS—"*Seven Against Thebes.*"

NEW YORK:
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66 NASSAU STREET.
1882.

It has been often suggested that the republication of this paper in a form convenient for general circulation, would afford special gratification to the many friends and admirers of the late Chief Justice, while it could not fail to find a welcome among professional readers in all parts of the country. This pamphlet is the result; and if its pages shall contribute only to the pleasure of those whose wishes have called it forth the author will feel amply compensated.

Appended will be found the judgment of its merits of late Hon. Reverdy Johnson, to whose criticism the original manuscript was submitted, together with the opinions formed of it by other eminent jurists after reading the printed article.

The thanks of the author are specially due to the Messrs. Harper & Brothers for their kind permission to reprint.

J. S. B.

247 Broadway,
New York, May 1, 1882.

From the late REVERDY JOHNSON.

BALTIMORE, June 20, 1873.

MY DEAR MR. BENSON:

I return to-day by express (Adams), your paper on the judicial life of Chief Justice Chase. You should have had it before, but that I was not able until to-day to have the whole of it read to me. It is written remarkably well, and does full justice to the Chief. Should you put it in pamphlet form do me the favor to send me a copy. Yours truly,

REVERDY JOHNSON.

From Mr. Justice MILLER, *of the Supreme Court.*

SUPREME COURT OF THE UNITED STATES,
WASHINGTON, March 12, 1882.

MY DEAR BENSON:

I am glad to learn that your article in Harpers', on the Judicial Record of my friend the late Chief Justice Chase, is to be republished in pamphlet form. I read the article in the magazine with much pleasure, and thought it a well considered and sound view of that eminent man as chief justice of our court. I am glad it is to be made accessible to his numerous admirers.

Very truly yours,

SAMUEL F. MILLER.

From Ex-Justice STRONG, *of the Supreme Court.*

WASHINGTON, March 10, 1882.

JOHN S. BENSON, Esq.

DEAR SIR:—I remember having read your article in Harpers' Monthly, on the judicial character of Chief Justice Chase, soon after its publication. I thought it then a discriminating and able presentation of the work of the Chief Justice, of the comprehensiveness of his views, and of the ability with which he enforced them. I thought it also a just exhibit of the fairness with which he addressed himself to the great public questions before the Supreme Court. Very respectfully yours, &c.,

W. STRONG.

From Mr. Justice BRADLEY, *of the Supreme Court.*

SUPREME COURT OF THE UNITED STATES,
WASHINGTON, April 9, 1882.

JOHN S. BENSON, Esq.

DEAR SIR:—Your article in Harpers' Magazine, on the judicial record of Chief Justice Chase, struck me as very appreciative and just. He was certainly an instance of a great mind successfully turning into a new channel of investigation in mature years. Your remarks as to the style of his opinions accord with my own views, which, I think, you will find expressed in the article "Salmon P. Chase," in Johnson's Cyclopedia.

Very truly yours,

JOS. P. BRADLEY.

From Mr. Justice HUNT, *of the Supreme Court.*

WASHINGTON, Dec. 20th, 1873.

DEAR SIR:

I have read your paper in Harpers' Monthly, on the judicial record of Chief Justice Chase, with much interest and instruction. It is a faithful and able presentation of the leading events in his judicial career, and a just illustration of his character. Very truly yours,

WARD HUNT.

JOHN S. BENSON, Esq,

From Chief Justice DAVIS, *of the Supreme Court, New York City.*

SUPREME COURT, Judges' Chambers,
NEW YORK, April 15th, 1882.

MY DEAR MR. BENSON:

I have read your paper in Harpers' Monthly, entitled "The Judicial Record of the late Chief Justice," with pleasure and profit. It is admirably written, and, I think, for the most part, accurate and just.

The proposed republication in a separate and more convenient form, is, in my opinion, very desirable, as in that way you will be able to place in the hands of the profession, and especially of its younger members, a work commendable for its style, brevity and faithfulness, from which all can derive instruction, and the still more valuable benefits that flow from the example of such an able and honest statesman and jurist as Salmon P. Chase.

In haste, I am, truly,

NOAH DAVIS.

J. S. BENSON, Esq.

From Chief Judge NEILSON, *City Court of Brooklyn.*

CHAMBERS.
THE CITY COURT OF BROOKLYN, N. Y.,
BROOKLYN, Feb. 11, 1882.

MY DEAR SIR:

I beg to say that I have read with care—more than once—and with great interest and satisfaction, your paper on Judge Chase, in the magazine.

It is of value to the judicial as well as to personal history, and well worthy of study and preservation. I am glad you had the time as well as the inspiration to write it.

I held the Chief Justice in such reverence and loving remembrance, that, it seems to me, his services and character cannot be too often recalled and illustrated.

With much respect, yours truly,

J. NEILSON.

THE JUDICIAL RECORD

OF THE LATE

CHIEF JUSTICE CHASE.

On the opening of the Supreme Court of the United States, December 7, 1864, in the course of some remarks in reply to resolutions of respect for the memory of the late Chief Justice Taney, read by James M. Carlisle, Esq., a life-long friend, Mr. Justice Wayne, then senior Associate Justice of the Court, thus referred to the deceased in connection with his predecessor: "As his predecessor, our great Marshall, had been, he was made Chief Justice, having but recently held high political office. Both were leaders in support of the administration of which they had been cabinet officers."

MARSHALL, TANEY AND CHASE.—A REMARKABLE FACT.

It is remarkable how aptly this language will apply to Chief Justice Chase. The same may be said of him without modification. And the parallel may extend still further as to all of them, and state what at first thought would seem to be an extraordinary fact—that neither of them ever sat upon the bench until elevated to the Chief Justiceship.* But in view of the great distinction which they each gained in that position, notwithstanding their previous lack of judicial service, it may perhaps be regarded as a question of some moment whether, in the selection of persons for high judicial appointment, care should not be taken to choose those who are not only eminent jurists as recognized by the profession, but who unite with that primary qualification those other public experiences and popular acquirements which cannot fail to give additional breadth and scope to judicial decision, and lend the attractions of superior grace and culture to the judicial

* The same is true of Chief Justice Waite, whose opening career has well assured a fourth parallel of eminence.

character. It is true there is a prejudice in the profession—and it is a wholesome one—against placing politicians on the bench.

Who should be Judges.—Mr. Webster's View, and an Opposing One.

Daniel Webster once declared that he would have no one on the bench who was not always and altogether a judge. And there are many lawyers of to-day who concur in this sentiment. But is it the correct view? Would those who entertain it have objected to Webster himself as a candidate for judicial honors? Are there any to dispute that, could he have been prevailed upon to accept the Chief Justiceship, his judicial record would have been more luminous for his vast experience in the forum of constitutional debate and in the administration of public law as Secretary of State? In other words, who will deny that Webster's great mind was more and more expanded from year to year, and his gigantic intellect all daily extended in its proportions and in its power, by the opportunities for contact and contest with other great intellects of the country and of the world afforded him by his Senatorial career and the duties of the Foreign Office? To deny this would be unreason, because a contradiction of the whole theory of mental development as admitted and established by the testimony of every known intelligence. How, then, shall any one say that he who is in all respects a great jurist will not be a greater man, and hence a greater judge, if superadded to his advanced proficiency in the law he be given all those other accomplishments with which the exercise of his abilities in public life will clothe him? Any other rule would lead to the anomalous conclusion that knowledge and experience do not impart wisdom, and, by a parity of reason, to the absurd hypothesis that the more a man knows the less he is qualified for responsible office. Where, then, is the ground for prejudice against a great lawyer as a judge because he has become greater than a great lawyer by acquiring the qualifications of a statesman? But further discussion of this subject would seem idle; and without assigning additional grounds for the belief that increase of knowledge is the exalta-

tion of the mind and the endowment of wisdom, it will be maintained as sound judgment, founded alike in reason and experience, that a great jurist who has had the opportunity and ability to achieve distinction in the field of statesmanship, and has thus enlarged his views of the functions of government and its relations to society, and gained a broader knowledge of the attributes and office of the law, is thereby further recommended for the bench, and entitled to claim special merit and fitness; and that exclusion from the bench for political reasons should extend only to *mere* politicians, whose public reputations are in no part founded upon or owing to any distinction at the bar or in the lore and science of the law, and not to those who are equal to the greatest as jurists, and wise over all as statesmen.

A Conclusive Test.

An unanswerable argument, derived from experience, in favor of this position, is the judicial record of the three Chief Justices whose names have been mentioned. They were all, when appointed, politicians; or, to use the word in its higher acceptation, they were all statesmen, without other than professional reputations as jurists. Yet neither of them was ever excelled in those rare qualities which distinguish the great judge, nor exceeded in the high attainments which are his qualification. Learned in the law they were, and equally learned in politics, in literature, and in the sciences. Without the first accomplishment they would not have consented to accept the place, and without the others they would not have shone so conspicuously in it. The great reputations they earned as judges were, without doubt, due, more than to all other causes, to their profound knowledge of the world, and practical acquaintance with the details of government, obtained in the public service as representatives of the people, and as officers and ministers of state. In the various political stations which they filled they acquired that intimate knowledge of the workings of our complex system of government, of the relations of the several co-ordinate branches to each other, and of the whole to the States which compose it, which enabled them as judges so to adjust the net-work of the fabric—the law—and so to apply

its spirit as to harmonize the parts of the system, and give effect to all those constitutional checks and balances which were devised and intended by the framers to produce and secure a proper equilibrium of power, and thus insure duration —the primary object of all government.

Consequences of a Lack of Public Experience.

And if is owing to the general deficiency in such public knowledge on the part of the judges of the inferior courts, both State and Federal, that we have the frequent conflict of jurisdiction between the authorities they respectively represent, from which the Union has suffered so much in the past, and has so much to fear in the future. On the one hand, a Federal question is not recognized where it exists; and, on the other hand, one is seen where it does not exist. Jurisdiction is assumed and exercised in both cases, judgment is entered, and the result is a certain clash in the execution, if the right has a champion, and, if not, the inevitable enforcement of error. The judges are, in many instances, remarkable only for their unfitness, and seem to have no conception that the petty issues of their obscure tribunals form part of a vast system of jurisprudence which, in some form and in some degree, is affected by their determinations, but proceed as if their jurisdiction was independent and final, and their decisions direct emanations from the fountain of justice.

The Gravity of the Situation when Mr. Chase was Appointed.

Never was a man, with or without judicial training, assigned a more difficult trust, at a more critical period, than was confided to the late Chief Justice by his appointment as head of the judiciary of the United States. And few have brought to the performance of grave judicial duty higher discretion and firmness, greater ability and moderation, or serener self-possession than did he. These enabled him from the first to fulfill promptly every requirement of the position, and to bear himself as one accustomed to its restraints. He was at home in the traditional gown from the day he took his seat, and his manner was as of one "always and altogether a judge."

His Rank as a Lawyer.

Although Mr. Chase had never claimed great distinction as a lawyer, he had for many years been regarded as an able jurist by those acquainted with his professional career and competent to judge. And being endowed with physical strength equal to his mental energy, he was no sooner commissioned than he entered upon the work of preparation with all the application of which he was capable, and with a firm resolution to do honor to the place, rather than to be honored by it. With this determination he studied the best models of judicial style, familiarized himself with any principle of law his practice had not encountered, and mastered the practice, rules and decisions of the tribunal over which he was to preside. And so well did he accomplish the task that the bar of the court and his brethren on the bench were astonished to find his opinions at once, as one of the latter has expressed it, "models of judicial excellence." His knowledge of every department of the law was discovered to be deep and profound, and his acquaintance with precedents wide as the range of decisions. This was early remarked—so early that one year after his accession, when the writer of this paper first became familiar with the affairs of the court, the fact was already the wonder of the profession, and the exclamation of his late political associates.

His Model as a Judge.

It is clear, from a close comparison of styles, that, unless nature endowed them with such similar mental organizations as to beget in their minds like processes of reasoning, his immediate predecessor, Chief Justice Taney, was his chosen model, and that from habitual study of his works he imbibed from him a manner of judicial composition strikingly identical. There is in their judicial writings the same succinct statement of facts, the same directness in dealing with the main question in a case, and care to avoid irrelevant and immaterial matters suggested in the argument. There is the same skill in grouping, and order in arranging the subjects of discussion, and the same faculty of marshaling conclusions, so that they swell and increase in momentum as the opinion proceeds, and culminate in convincing logic as it concludes. There is the same

elegance of diction, force of expression, and ease and grace in passing from subject to subject. There is the same concentration, the same precision and power, and a like absence of abruptness, coarseness, and incongruity. There is no assertion, no declamation, no prolixity, but, in brief, the presence and absence of everything required to make their opinions exact parallels of judicial completeness and intellectual mastery.

It is not claimed that this eminent jurist was his special study, admiration, and example because he did not find great excellence elsewhere—for to do so would be to do injustice to his estimate of others, and violence to truth—but because Mr. Taney's terse, unimaginative style peculiarly recommended itself to his taste as a forcible and compact form of expression for judicial utterances, better adapted to the uses of reason and logic than the more rhetorical and embellished forms. Marshall was also an ideal of his of what a judge should be; but his more elaborate and metaphorical style had not the sympathetic charm for him which he found in the simple, synthetic sentences of Taney, and which are so remarkably reproduced in his own writings.

His Appreciation of the Trust.

Soon after Mr. Chase's appointment he remarked to a friend that he was to take the place left vacant by Marshall and Taney, and referred to them as two of the greatest judges the world had yet produced, adding that he should have to be a hard student to acquit himself creditably as their successor. But that he has acquitted himself so well, and with such distinction as will give his friends no cause to fear in this behalf, while it will give his own successor ground for apprehension lest there shall be too great a contrast in the records of the two incumbencies, is beyond doubt; and this fact should have great weight with our good President when casting about for the proper qualifications with which to fill the place. No other position in the country bears any relation to this in importance, as the great respect of the people for the office and their reliance upon the court attest; and if there be those who would assume it unhesitatingly, without distrust of their abilities, they are, of all others, the very persons who are not competent to

its duties. The country has already suffered too much from a lamentable, humiliating, and dangerous lack of character, capacity, and integrity on the bench; and it is shown by experience that these failings commonly go together, and are to be found associated in the same person. And of the two, the failure of judicial integrity is least to be feared, for it is readily detected, and is always guarded against; but a lack of capacity is the more to be dreaded, because, unless absolutely disqualifying, it is never remedied, and constantly weakens and discredits the canons of the law.

Importance of Judicial Style and Clearness.—Common Law Excellences.

Concise language and perspicuity in the statement of premises and conclusions were the glory of the common-law jurists, and have immortalized many names in the annals of judicature. And these excellences of style and brevity should be the emulation of those in our country who are charged with the interpretation and application of statutory enactments, in the administration of which there is much room for misapprehension and miscarriage, because of the great diversity of subjects for adjudication. But there seems to be little effort on the part of a great majority of our judges to acquire those virtues of accuracy and explicit enunciation which characterized and still adorn English jurisprudence; and the consequence is that it is an every-day occurrence in our courts to find opposing counsel citing the same case as an authority in support of antagonistic theories, because its points are so carelessly put and its conclusions so loosely drawn that they cannot be understood, and may be construed to meet the necessities of counsel at pleasure. This is a shame to the profession which produces the bench, and to the bench, which, in turn, educates the profession. And to effect improvement in the courts of original jurisdiction it is in the highest degree essential that the appellate tribunals, and especially those of last resort, shall furnish models for their study, instruction, and elevation.

Responsibility for Judicial Appointments.

In view of all this, is it possible to conceive of higher responsibility than devolves upon him who is charged with the

duty of appointing judicial officers? There is some excuse for the people, under the elective system, if they fail to secure the best men for the bench; for they are not fitted to judge of the qualifications of candidates and to choose between them; and if they were, there is no adequate opportunity for conference in respect of public matters open to the mass of electors. And this is probably the secret of the judicial incompetency, grossness, and corruption which prevail in many of our large cities. But there is no apology proper to be offered for the elevation of other than the most eminent ability and unquestioned purity to the bench, where the selection is confided to an intelligent Executive. He has at command the means of ascertaining all the necessary facts touching the fitness of those whose qualifications are considered, and need not fail in his duty to the public.

Momentous Issues which awaited the new Chief Justice.

When Mr. Chase entered upon the duties of Chief Justice the country was in the crisis of its existence. The Union was threatened with destruction by the attempted withdrawal of several of its members, whose people maintained that the Constitution was a compact for purposes of security against a foreign foe only, and was not a voluntary bond on the part of the States to enforce their own *involuntary* adherence to the general government. And whether the power which had been assumed and exercised by the legislative and executive branches to coerce the seceding States, and to preserve the integrity of the Union by force, was lodged in the government by virtue of any provision or intendment of the Constitution, was yet to be authoritatively declared by the other co-ordinate branch. Preceding and following this was a multiform variety of other questions, preliminary and resultant, scarcely less important, raised by the war, which the developments of peace had never evolved for adjudication, and which were then pressing at the bar of the court for that final determination which was to establish a memorable page of precedents for the future government of the country and guidance of the world. Among the earliest of these was a long list of prize and other cases, presenting every class of questions which could proceed from a condition

of civil war, in which the Chief Justice rendered a series of decisions which alone would have placed him in the front rank of jurists, and insured a meed of fame falling to the lot of few judges, and sufficient to fill the measure of an honorable ambition.

The Milligan Case.—Military Commissions in States at Peace.

In his second year the great Milligan case was decided, although the formal opinions were not delivered until the commencement of the next term.

Milligan, a citizen of Indiana, was arrested, tried, and convicted by military commission of conspiring against the government, and sentenced to be hung on the 19th of May, 1865. *Habeas corpus* was issued, and the Circuit Court divided in opinion on the questions presented, and certified them to the Supreme Court for answer. Mr. Justice Davis delivered the opinion of the court, which, by its conservative character and spirit, gave him the prominence he attained as a candidate for the Presidency before the Cincinnati Convention. It was, in substance, that a person who is a resident of a loyal State, where he is arrested, who was never a resident of any State engaged in rebellion, nor connected with the military or naval service, cannot be regarded as a prisoner of war; nor, even when the privilege of the writ of *habeas corpus* is suspended, be tried (the courts being open) otherwise than by the ordinary courts of law. The constitutional guaranty of trial by jury is intended for a state of war as well as for a state of peace; and military commissions, organized during the late war in a State not invaded and not engaged in rebellion, in which the Federal courts were open and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offense a citizen who was neither a resident of a rebellious State, nor a prisoner of war, nor a person in the military or naval service. *And Congress could not invest them with any such power.*

The Power of Congress.

To all of this the Chief Justice assented, except as to the declaration that it was not in the power of Congress to author-

ize such a commission to do such an act at such a time, and except as to the conclusion that when the privilege of the writ of *habeas corpus* is suspended there are no cases in which trial and punishment by military commission, in States where civil courts are open, may be authorized by Congress. In a dissenting opinion as to these particulars, citing the case of Indiana as a military district and an invaded State, he said:

"We cannot doubt that in such a time of public danger Congress had power under the Constitution to provide for the organization of a military commission, and for trial by that commission of persons engaged in the conspiracy. The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exercising the power; but that fact could not deprive Congress of the right to exercise it. Those courts might be open and in the unobstructed exercise of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators.

"In Indiana the judges and officers of the courts were loyal to the government. But it might have been otherwise. In times of rebellion and civil war it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies."

Mr. Justice Davis had said in his opinion, that civil liberty and this kind of martial law could not endure together—that they were in irreconcilable antagonism, and in the conflict one or the other must perish; for the nation cannot be always at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution; and that the time might come when wicked and ambitious men would fill the place once occupied by Washington and Lincoln; and if this right were conceded, and the calamities of war should befall us again, the dangers to human liberty are frightful to contemplate; and that if our fathers had failed to provide against just such a contingency, by rendering it impossible for an unscrupulous Executive to usurp the government, they would have been false to the trust reposed in them.

A Wide Variance of Judicial Opinion.

Here was a wide difference in judicial opinion on the subject of the distribution and restriction of the powers of gov-

ernment under the Constitution, and upon the question of the sources of danger to the Union, and which very evenly divided the court. The Chief Justice and three associate justices preferred to trust the exercise of a dangerous but necessary power in time of war to the Executive chosen by the whole loyal people, rather than to confide it to the discretion of a sectional tribunal which, in consequence of secret disloyalty, might decline to enforce it. And they believed the framers of the republic had entertained this view, and so constructed the organic law as to give it effect. Mr. Justice Davis and four of his associates saw no such danger of a failure of justice in the courts at such a time as would justify the investiture of the President with arbitrary authority, which was liable at any moment to be unduly exerted; and they believed that the fathers had provided against such executive supremacy. And it remains to be seen by future generations which is correct, the intimation of danger from executive usurpation, or the apprehension of evil from a corrupt or disloyal judiciary; and also, by inference, which of these was the contingency foreseen and provided against by the authors of the Constitution. The decision was on the side of the judiciary; the dissent in favor of the executive. Time only will try the conclusions.

Effect of Life Associations Upon the Judgments of Men.

It is interesting to note in a case like this the marked influence of life associations upon the minds even of the best and wisest of men, as affecting their judgments through their sympathies. Judge Davis, raised and remaining in the atmosphere of the courts, and further allied to them by a considerable judicial term, was firm in the assertion of civil jurisdiction, and quick to repel attempts at executive encroachment; and long accustomed to combat the assumptions of the political departments, he was naturally distrustful of their tendencies and jealous of their power.

The Chief Justice, although then honoring supreme judicial position, had early entered and late remained in the political departments, and became as fully imbued with their sympathies and aspirations as had Judge Davis with the spirit of the judicial department. It was equally natural, therefore, that

while striving to be, and believing himself wholly unbiased, he should respond to kindred impulses, and that regarding his experience in the political departments as best qualifying him to judge of the necessity of extreme measures in conjunctures of extreme peril, and feeling that the decision was a blow to the efficiency of the government, he should be impelled to arraign the principle affirmed by a majority of the court as an insufficient postulate, and to declare his conviction that the wisdom of the founders accorded with this view, and intended that such a power should reside in the executive, and prevail in the emergency of war when the public safety required it. And for the whole of his professional life having suffered defeat at the bar of the courts,* by alleged judicial evasion, in attempts to gain recognition of certain political rights, now established by revolution, which he believed to be clearly constitutional, it is not surprising that he should doubt the certain efficiency of the civil judiciary at any time, and for that reason withhold his assent to the proposition that it shall be sole arbiter of justice in time of public danger.

The Executive and the Judiciary.—The Chief Justice Inclines to the Side of the Former.

Fresh from the absorbing consultations of the executive council, and conscious of its integrity and devotion to liberty, as tested by his own experience and established by results, he could not permit even its future patriotism to be questioned from the bench, without pointing out to the latter the danger of its own defection. Had it been his good fortune to live to the ripe age of his predecessor and judicial prototype, it is possible, and even probable, that thirty years of term routine would have deadened the old and begotten in him new sympathies, more in harmony with the dull monotony of the bench, but less likely to inspire that wholesome interest in public questions and watchful vigilance of public affairs which preserve the animation and usefulness of the judge, renovating his mind, augmenting his knowledge, and giving strength, vigor, and comprehensiveness to his decisions.

* In contests under the Fugitive Slave Act—Mr. Chase being always the champion of the fugitive who had escaped across the border to Cincinnati, and there sought to resist rendition

JUDICIAL CHARACTER AND HABITS.—DANGER OF DEVOTION TO EXCLUSIVE SUBJECTS.—THE SECRET OF INTELLECTUAL POWER.

And without some attention to public matters, some interest in current events, there is danger of the approach of that destroying malady of those who would be "altogether judges," which perhaps may be not inaptly termed judicial crystallization—a sort of metempsychosis of the mind by which it passes from the state of personal consciousness and natural sympathies to a condition of morbid abstraction and abnormal devotion, and relinquishing all other aims and aspirations as unworthy, heroically dedicates itself to the perpetual contemplation of judicial ends and essences, as if their proper study required a sacrifice, and they were arbitrary and abstract principles, perfectly ascertained, and to be uniformly applied as contained in the repositories of judicial learning, and were not simply the collected results of human experience, reduced to systems of government and rules of conduct ever undergoing modification and change in the progress of civilization, and to be as carefully sought and as profitably studied on the latest pages of the open volume of life, as in the dusty tomes of libraries whose precedents perish with their coverings along the pathway of the generations. Instances of such consecration and absorption are frequent, but the cause is generally misapprehended. That habitual absence of mind which is popularly regarded as an indication of fixed and fathoming thought, is but the listless reverie of mental *ennui* or enervation, proceeding with legitimate certainty from the strain of a mind unrelieved or overwrought in the investigation and exposition of exclusive subjects. Strong, active minds, invigorated by diversified thought, have no such infirmity. And busy men of the world experience no such weakness in grasping the actual of life's concerns. It is the offspring of weariness and apathy, and wherever detected is an evidence of impaired faculties, of diminished powers, of insipient intellectual retroversion. If it would be avoided by the bench, the functions of the judge and the faculties of the man must be equally and evenly exercised, and the senses of the body must be indulged with healthful excitement, even if in direct opposition to the

inclinations or prejudices of the mind. The soul draws its inspiration from the senses, which it refines and elevates; and when, in obedience to the behests of virtue, it seeks to gain the ascendency by denying them proper gratification, it does but waste its own vitality, weaken its power over the propensities, and by precipitating psychomachy, destroy all. To preserve *mens sana in corpore sano*, sustain the judge and succor the man, there must be equilibrium of the mental and physical forces, and union of the judicial and personal characters. Where this rule occurs there is true greatness; where it does not, there is chance result.

The Test Oath Cases.—Rebel Theology relieved from Proscription.—Religious Freedom.

Following the Milligan case came the scarcely less noted Test Oath cases from Missouri and Arkansas, which resulted in a decision against the validity of such an oath as a means of establishing the fact of loyalty, on the ground that, under the form of creating a qualification or attaching a condition, the States cannot in effect inflict punishment for a past act which was not punishable when the act was committed, the court holding the new constitution of Missouri, requiring clergymen to take an oath that they had never given aid or comfort to or sympathized with the rebellion, as a condition precedent to their entering upon the duties of their vocation, and the act of Congress of 1865, prescribing a similar oath to be taken by lawyers before being permitted to practice in the Federal courts, to be in this *ex post facto* in their operation, and void.

The Chief Justice Again Leans to the Side of Strong Government.

In these cases the Chief Justice again took the unpopular side, again leaning to the side of the government, and concurred in an opinion written by Mr. Justice Miller, maintaining that the purpose of the oath prescribed in each case was to require loyalty as a qualification, and not to punish past acts of disloyalty, and that it was therefore within the competency of State authority to impose. And it was said that the *ex post facto* principle which the majority of the court had discovered in the laws to be affected by their decision could

"only be found in those elastic rules of construction which cramp the powers of the Federal Government when they are to be exercised in certain directions, and enlarge them when they are to be exercised in others." "No more striking example of this could be given," it was added, "than the cases before us, in one of which the Constitution of the United States is held to confer no power on Congress to prevent traitors practicing in her courts, while in the other it is held to confer power on this court to nullify a provision of the constitution of the State of Missouri." Touching the sanctity of the ministerial office, and the inviolability of religious freedom in this country, which had been dwelt upon at length by counsel in the Missouri case, it was said that no restraint had been placed by the Constitution of the United States upon the action of the States in respect of the subject of religion; but that, on the contrary, in the language of Judge Story, "the whole power over the subject of religion is left exclusively to the State Governments, to be acted upon according to their own sense of justice and the State constitutions." The majority of the court having held that the pardon of the President relieved the petitioners from all disabilities of whatever character, the dissenting opinion, conceding the fullness of the pardoning power, answered that if the oath prescribed was not a punishment, but merely a requirement of loyalty, as held therein, then the pardon of the President could have no effect to relieve parties from taking it. If it was a qualification which Congress and the States have a right to require, the President could not, by pardon or otherwise, dispense with the law requiring such a qualification.

The writer remembers to have seen the Chief Justice by impatient gestures put away interruptions by officers of the court, and give undivided attention as the Hon. Reverdy Johnson, then a Senator and now a private citizen, the Hon. M. H. Carpenter, then a private citizen and now a Senator, and David Dudley Field, Esq., then and now a private citizen, exerted their high powers in behalf of the petitioners in these cases and of the principle involved; and distinctly recalls the expressions of disappointment which fell from counsel when it was known by the decision that he was one of those who sus-

tained the "oath of loyalty" in Missouri, and the "iron-clad oath" in the Federal courts.

The Great Question of the Age.—Power of the Government to Maintain the Union.

Then came the great question, paramount over all, of the power of the government under the Constitution to preserve itself and maintain the Union by force against the will of the States. Not so important because of the fact of preservation, for that was already accomplished, but because it was to be determined whether the success of the government was the result of the exercise of its legitimate powers, and therefore the triumph of a precious right, or was the chance event of the use of unjust, arbitrary, and oppressive measures, executed by superior force, in violation of the Constitution and the reserved rights of the States, and therefore the consummation of a grievous wrong. And in view of the incalculable effect which the decision of this momentous question, whatever it should be, was to have upon the destinies of man in its influence upon the judgment of the nations of the merits of popular government, it is justly entitled to be regarded as the most superlative question ever presented for the consideration of an earthly tribunal. Its solution was to increase the confidence of the world in the permanence of republican institutions, and accelerate their general adoption by demonstrating that their organization is not inconsistent with strength and stability, or it was to subject them to reproach and repudiation as conferring no protection on the person and property of the citizen, because affording no guaranty of perpetuity. Upon it depended the continuance of our republic as a constitutional government, and upon that contingency depended the further progress of liberty and equality among men. Neighboring monarchies looked on with malignant satisfaction, hoping and expecting to see the last experiment of free government perish forever, and their rulers secretly coalesced to accomplish that result. Patriots every where desponded and freedom languished, while kings and courtiers rejoiced and crowns were reassured.

THE SWIFT CONCLUSIONS OF THE ENEMIES OF THE REPUBLIC.

The collapse of the republic was from the first regarded as certain by its enemies, if not by successful revolution, still as surely by a fatal variance between its several departments, leading to such a departure by the executive from the constitutional interpretations of the judicial branch as would paralyze, and at last destroy it. If, exulted they, the judiciary should hold the Union under the Constitution to be based upon the consent of the States, and that these could withdraw at pleasure and terminate its existence beyond the rightful authority of the Federal power to sustain it by force, and the government should accept that judgment and respect the decision, there is an end of the Union. If the government should disregard the judgment and override the judiciary, it would be but the first step of a series by which it would indubitably glide away from its base and ultimately become the worst form of despotism—a military dictatorship. And if, on the other hand, the judiciary should deny the right of secession, and sanction the course of the political departments, it would be a forced construction of the Constitution, infinitely worse than the forced preservation of the Union without it, amounting to a voluntary abdication of justice, and permitting the final overthrow of liberty by the strong arm of centralization, whose encroachments would in the end result in usurpations more odious and oppressive than monarchy itself.

Thus powers professing to be friendly, but in truth actuated by ill-concealed enmity, prematurely consigned our palladium to anarchy and oblivion in any event, beyond conceivable doubt, and congratulated themselves and the cause of royalty upon the downfall of the American republic and the eternal extinction of the federative principle. But, happily for us and for mankind, the result was different. Before the question was reached by the courts the danger from revolution was passed, and the only solicitude was that the means adopted to save the country should be justified by judicial sanction. And when at last the question was decided, the judiciary upheld the construction placed upon the Constitution by the executive and legislative branches of the government, not in obedience to

popular clamor, but on grounds which are unanswerable in any forum, and which command the respect and confidence of Federal and "Confederate" citizens alike. The three departments were in harmony upon the question of the character of the government and the nature of its powers, and in accord as to the means invoked to preserve and enforce them.

The Constitutional View of the Relation of the States.

The case of Texas *v.* White presented the question in a direct form, and the Chief Justice delivered the opinion of the court, from which we take three consecutive paragraphs of conclusive reasoning, as follows:

"The Union of the States never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation. By these the Union was solemnly declared to 'be perpetual.' And when these articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble, if a perpetual Union made more perfect, is not?

"But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still all powers not delegated to the United States nor prohibited to the States are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term that 'the people of each State compose a State, having its own government, endowed with all the functions essential to a separate and independent existence,' and that 'without the States in union there could be no such political body as the United States.' (Lane *v.* Oregon.) Not only, therefore, can there be no loss of separate and independent autonomy to the States through their union under the Constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

"When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration or revocation, except through revolution or through the consent of the States."

What could be more clear, concise, and convincing than this? How simple the logic! "*What can be indissoluble, if a perpetual union made more perfect, is not?*" How grand the conclusion! "*The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.*"

The Effect of the Decision on the Destinies of Nations.

Thus definitively was the great question settled. And following it a thrill of joy went round the earth. The freest and best country known to man was saved to representative government, redeemed from reproach and justified before the world; and wherever power is prescriptive and rights are prerogative, except as the gifts of princes, there were souls to rejoice. The oppressed in all lands felt that they had still a secure asylum, and republican subjects of Eastern kings and conquerors rapturously saw through the breaking clouds the triumphal arch of Freedom in the West—the bow of promise on the brow of Empire. That there was such an ark of safety for human hopes and happiness as a composite republic, with a constitutional government operating directly upon the people irrespective of sectional limits, entitled to their undivided allegiance, and clothed with adequate power to protect and defend itself against all foes, from within as well as from without, was an annunciation which shook thrones and gladdened continents. The suppressed republicanism of France and Spain asserted itself in answer to this invitation at the first opportunity, and the leagued assaults upon the unhappy republic south of us, at a time when the act was deemed safe by reason of our domestic difficulties, was punished, and the blood and carnage of Maximilian's reign and fall were avenged. The same spirit openly

declared itself in the limited and milder monarchy of Britain, and loyal subjects of the crown who had stealthily given aid and comfort to our revolting States, and contributed to the fullest demand toward the success of the rebellion, now tremble at the signs of retribution at home and abroad. And the government which winked at their violations of public law, and connived with them to break the shield of democracy in America, and prop the crumbling dynasties of Europe, now shrinks with dismay from the contemplation of republican progress on the soil of sceptres, and hopes to stay the tide of revolution by encouraging still further contributions in the interest of monarchy, to sustain the armies of the Carlists in the field, and the agents of the Bourbons in the forum.

Such are the fruits of our triumph. For who believes that had the rebellion succeeded, and our Union been dissolved, there would have been any tidings of republicanism in Europe to-day? No one. On the contrary, it was and is the universal assent that the overthrow of the government of the United States would silence its advocates, stifle its principle, and rob the world of refuge and freedom of a home for centuries to come.

Powers of de facto Governments.

The next case of general interest, in point of time, was one of the first importance to the people of the South, involving as it did their entire business and social relations, by jeopardizing civil contracts made while subjected to Confederate authority. It was the case of Thorington *v.* Smith, from Alabama, determining for its main question whether contracts for the payment of Confederate money, made during the rebellion between parties residing in the Confederate States, could be enforced in the Federal courts. The Chief Justice delivered the opinion of the court, and in the course of it, after defining the Confederate government as one of paramount force, said:

"It seems to follow as a necessary consequence from the actual supremacy of the insurgent government as a belligerent within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government temporarily occupying a part of the territory

of the United States. Contracts stipulating for payment in this currency cannot be regarded, for that reason only, as made in aid of the foreign invasion in the one case or of domestic insurrection in the other. They have no necessary relations to the hostile governments, whether invading or insurgent. They are transactions in the ordinary course of civil society, and though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection. We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligations."

Thus the necessary dealings of the people over whom the Confederate States exerted government were sustained, the obligations of contract left unimpaired, and a conclusion avoided which would have overturned all titles and destroyed all ownership at the South, and seriously have disturbed the well-being of society.

The Legal Tender Cases.

Public familiarity with the Legal Tender cases, in consequence of the direct effect of the decision upon all the affairs of the people, renders an extended statement of the points decided unnecessary. In Hepburn *v.* Griswold, the Chief Justice delivered the opinion of the court, holding, in effect, that there is no grant of power in the Constitution, express or implied, authorizing Congress to make any description of credit currency a legal tender in payment of debts. These views of the Chief Justice took the country somewhat by surprise, as it was generally supposed that the Legal Tender act was his special measure, as a financial necessity, when Secretary of the Treasury. And in the subsequent cases of Knox *v.* Lee and Parker *v.* Davis, overruling this decision (the court being differently constituted), Mr. Justice Strong, who delivered the opinion, after holding substantially that the power to issue legal tenders exists, because such notes may at any time become a necessity to the end of preserving the government, adverted to Mr. Chase's agency in their issue, in this instance, thus:

"It is an historical fact that many persons and institutions refused to receive and pay those notes that had been issued, and even the head of the Treasury represented to Congress the necessity of mak-

ing the new issues legal tenders, or, rather, declared it impossible to avoid the necessity."

MR. CHASE AS SECRETARY OF THE TREASURY AND CHIEF JUSTICE. —TRIUMPH OF THE MAGISTRATE OVER THE MINISTER.

The answer of the Chief Justice to this representation is all in respect of these cases which remains of interest in this connection. It was as follows:

"The reference made in the opinion just read, as well as in the argument at the bar, to the opinions of the Chief Justice, when Secretary of the Treasury, seems to warrant, if it does not require, some observations before proceeding further in the discussion.

"It was his fortune at the time the legal tender clause was inserted in the bill to authorize the issue of United States notes, and received the sanction of Congress, to be charged with the anxious and responsible duty of providing funds for the prosecution of the war. In no report made by him to Congress was the expedient of making the notes of the United States a legal tender suggested. He urged the issue of notes payable on demand in coin, or receivable as coin in payment of duties. When the State banks had suspended specie payments, he recommended the issue of United States notes, receivable for all loans to the United States and all government dues except duties on imports. In his report of December, 1862, he said that 'United States notes receivable for bonds bearing a secure specie interest are next best to notes convertible into coin,' and after stating the financial measures which in his judgment were advisable, he added: 'The Secretary recommends, therefore, no mere paper money scheme, but, on the contrary, a series of measures looking to a safe and gradual return to gold and silver as the only permanent basis, standard, and measure of value recognized by the Constitution.' At the session of Congress before this report was made, the bill containing the legal tender clause had become a law. He was extremely and avowedly averse to this clause, but was very solicitous for the passage of the bill to authorize United States notes then pending. He thought it indispensably necessary that the authority to issue these notes should be granted by Congress. The passage of the bill was delayed, if not jeoparded, by the difference of opinion which prevailed on the question of making them a legal tender. It was under these circumstances that he expressed the opinion, when called on by the Committee of Ways and Means, that it was necessary; and he was not sorry to find it sustained by respected courts, not unanimous indeed, nor without contrary decisions of State courts equally respectable. Examination and reflection under more propitious circumstances have satisfied him that this opinion was erroneous, and he does not hesitate to declare it. He would do so just as unhesitatingly if his favor to the legal tender clause had been at the time decided, and his opinion as to the constitutionality of the measure clear."

This statement of the Chief Justice, which has never before been made public, explains any apparent conflict of view between his financial and judicial opinions, and shows his judgment to have been that the legal tender clause was rather a necessity to the prompt passage of the currency bill than to its successful operation if passed without it; for he says in the course of his opinion that this clause was a confession on the part of the government that the notes would not be received except by compulsion, and that the tendency of such a confession was to depreciate the value of the currency and the credit of the country.

Candor that was Great as Rare.

The statement also exhibits in the character of the Chief Justice that rare quality of public men, the candor to confess past doubt and indecision when once grounded in judgment and confirmed in opinion by better opportunities for reason and reflection. The pressure of events in public affairs, especially under the circumstances of this case, may well excuse assent without the sanction of judgment by a public officer, when dissent is the exception, and the popular voice demands the concession, the difference of opinion being of less moment than united and immediate action.

Validity of Prior Contracts Affecting Slave Property.

An important question following emancipation was upon the validity of prior contracts affecting property in slaves; and the case of Osborn *v.* Nicholson, from Arkansas, disposed of it, with the concurrence of the Chief Justice, in a just and satisfactory manner. The decision was—Mr. Justice Swayne delivering the opinion of the court—that negro slavery having been recognized as lawful at the time and the place of the contract, and the contract having been one which at the time when it was made could have been enforced in the courts of every State in the Union, and in the courts of every civilized country elsewhere, the right to sue upon it was not to be considered as taken away by the Thirteenth Amendment, passed after rights under the contract had become vested, the destruction of vested rights by implication never being presumed.

SOVEREIGNTY IN THE TERRITORIES.—MEASURE OF SELF-GOVERNMENT CONCEDED TO THE PEOPLE.

The case of Clinton *v.* Englebrecht, bringing to this court for decision the contest between the Territorial and United States marshals in Utah concerning the summoning of juries, establishes an important principle in respect of Territorial organizations, which is of sufficient interest to be set forth here. It was held—the Chief Justice delivering the opinion—that the theory upon which the various governments for portions of the Territory of the United States have been organized, has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of the national authority, and with certain fundamental principles established by Congress. And the fact that judges of the District and Supreme courts of the Territories are appointed by the President under acts of Congress, does not make the courts which they are authorized to hold "courts of the United States." Such courts are but the legislative courts of the Territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the Territories belonging to the United States. Accordingly, jurors summoned for duty therein under the acts of Congress applicable only to courts of the United States created under the article of the Constitution which relates to the judicial power, are wrongly summoned, and a judgment on their verdict, if properly objected to, cannot be sustained. This was a victory for the Territorial officers over the marshal of the United States, and even over the judges of the courts—for the latter had sustained the proceedings of the former—and is a judicial enforcement in a modified form of the old-time theory of squatter sovereignty, or of the rights of the settlers in the Territories to manage their own affairs in their own way. And it is said that the "Trustee in Trust of the Church of Jesus Christ of Latter-day Saints" regarded it as sanctioning the right of the people of the Territory to establish such domestic institutions as they choose, including polygamy. But whether it extends to that extremity will better appear in the light of future events.

CONSTRUCTION OF THE THIRTEENTH AND FOURTEENTH AMENDMENTS.—THE QUESTION OF MONOPOLY.—RIGHTS OF CITIZENS.

The last great question in the decision of which the Chief Justice participated was but recently decided, in the Slaughter-House cases from Louisiana, placing a construction upon the Thirteenth and Fourteenth Amendments. In those cases it was complained that the Legislature of Louisiana had chartered a slaughter-house company, granting, among other exclusive privileges, for a period of twenty-five years, to seventeen persons, the right to establish and maintain stock-yards, landing-places, and slaughter-houses for the city of New Orleans, at which all stock must be landed, and all animals intended for food must be slaughtered. This charter was attacked as creating a monopoly so effectual as to deprive the butchers of the State of the right to continue the business of their lives, unless they would submit to such terms as might be imposed by the company. And this, it was maintained, was in violation of the Thirteenth Amendment, which forever prohibits slavery and involuntary servitude in the United States; the argument being that the seventeen persons composing the company were the *dominants* of the business monopolized, and the butchers of the State its *servients*, in such a manner and to such a degree as to render them the involuntary subjects and slaves of an artificial person representing the authority of the State. It was in contravention of that provision of the Fourteenth Amendment which declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The opinion of the court, delivered by Mr. Justice Miller, stated in brief, sustained the grant of privilege contained in the charter, under the conditions and limitations imposed, as being a police regulation within the power of the State Legislature, unaffected by the Constitution of the United States previous or subsequent to the Thirteenth and Fourteenth Amendments. It was not affected by the Thirteenth Amend-

ment, which refers to and is applicable only to personal servitude and not to servitude attached to property, and had for its direct object the permanent freedom of the negro race. Nor was it affected by the Fourteenth Amendment, which distinguishes between citizenship of the United States and citizenship of the States, and refers only to the privileges and immunities of citizens of the United States, and not to the privileges and immunities of citizens of a State (rights of property, etc.), and was not intended to protect the citizen of a State against the legislation of the State. The objection that the State has deprived the butchers of liberty and property without due process of law was held to be unsound under former judicial interpretations of the Fifth Amendment, which contains a similar prohibition; and the clause prohibiting the States from denying to any person the equal protection of the laws was construed as being intended only for the protection of the negro against partial legislation by the States.

THE CHIEF JUSTICE OPPOSED TO MONOPOLIES.—ASSENTS THAT THE FOURTEENTH AMENDMENT PLACES THE COMMON RIGHTS OF AMERICAN CITIZENS UNDER THE PROTECTION OF THE NATIONAL GOVERNMENT.

The Chief Justice concurred in a dissenting opinion delivered by Mr. Justice Field, holding, in substance, that the slaughter-house company is an odious monopoly, exceeding the limits of the police power of the State, swallowing up the right to pursue a lawful and necessary calling previously enjoyed by every citizen; and that if such exclusive privileges can be granted to seventeen persons, they may, in the discretion of the Legislature, be equally granted to one individual. And if they may be granted for twenty-five years, they may equally be granted for a century, and in perpetuity. Conceding the force of the argument made by counsel for the petitioners under the Thirteenth Amendment, it was not considered necessary to the disposition of the cases in their favor to accept it as entirely correct. But the Fourteenth Amendment was regarded as covering the whole question. It was adopted to obviate objections to the Civil Rights act, and to place the com-

mon rights of American citizens under the protection of the national government. A citizen of a State, by virtue of that amendment, is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a freeman and a free citizen now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State. They do not derive their existence from State legislation, and cannot be destroyed by its power.

Under the Fourth Article of the Constitution, providing that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the United States," no State could create a monopoly in any known trade or manufacture in favor of its own citizens, or any portion of them, which would exclude an equal participation in the trade or manufacture attempted to be monopolized by citizens of other States. And what that clause does for the protection of citizens of one State against the creation of monopolies in favor of citizens of other States, the Fourteenth Amendment does for the protection of every citizen of the United States against the creation of any monopoly whatever. The privileges and immunities of citizens of the United States, of every one of them, wherever resident, are secured against abridgment in any form by a State. The Fourteenth Amendment places them under the guardianship of the national government. All monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness, and were held void at common law in the great case of Monopolies decided in the reign of Elizabeth. To citizens of the United States everywhere, all pursuits, all professions, all avocations, are open, without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition; and the Fourteenth Amendment makes it essential to the validity of the legislation of every State that this equality of right shall be respected.

The opinion concludes with an expression of regret that the validity of the legislation in Louisiana—so widely departing from the principle of equality—is recognized by a majority of the court; for by it, it is declared, the right of free labor,

one of the most sacred and imprescriptible rights of man, is violated.*

Woman's Right to Practice the Professions.—An Adverse Opinion Sanctioned by the Sex.

A case of some significance, decided at the same time, and, in effect, by the same opinion, was that of Mrs. Bradwell, of Illinois, who sought to be admitted as an attorney in the courts of that State, and was refused by the Supreme Court on the ground that females are not eligible under the laws of the State. The judgment was affirmed here, Mr. Justice Miller delivering the opinion, which held that the right to practice law in the State courts is not a privilege or immunity of a citizen of the United States within the meaning of the Fourteenth Amendment, and that the power of a State to prescribe the qualifications for admission to the bar of its courts is unaffected by that amendment, and this court cannot inquire into the reasonableness or propriety of the rules it may prescribe.

Justices Swayne, Field, and Bradley concurred in the judgment, but not for the reasons assigned in the opinion of the court; and Mr. Justice Bradley read an opinion setting forth their views, denying "that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life."

The Chief Justice Leaves no Record of His Views.

The Chief Justice dissented from both of these views, but left of record only that fact to attest his own.† It is known,

* This decision revolutionized the Court; causing Mr. Justice Miller, the sturdy supporter of strong government, and Mr. Justice Field, the steadfast friend of State Rights, to appear to have exchanged positions.

† The following from Mr. Justice Bradley, under date of 22d August, 1873, furnishes the only inkling of the views of the Chief Justice on the question raised by this case the author was able to obtain; and as it states very concisely and clearly the gist of the opinions read, it is given as a note to the case:

"I am afraid I cannot give you any light on Chief Justice Chase's views on the question of woman's right to practice the learned professions, except this: that I know he believed in the right, and on that ground would have dissented from the judgment of the court if necessary. On what ground he thought the

however, that he did prepare a written dissent, in which he briefly reviewed the two opinions, and arrived at the conclusion that *no principle was involved in the decision.* The dissent was based upon the same objections to the construction placed upon the Fourteenth Amendment by a majority of the

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point not involved in the Myra Bradwell case, I do not know, having never heard him say. The position of the other judges, in brief, was this: Without determining the question whether a woman is entitled by right, as a citizen of the State, to follow all lawful pursuits, and enjoy all privileges enjoyed by men—five judges, Clifford, Miller, Davis, Strong, and Hunt, held, that the United States tribunals have no jurisdiction either before or since the Fourteenth Amendment to determine such a question, or any question concerning the rights of the citizen, except federal rights, *i. e.*, rights expressly given by the Constitution or laws of the United States, and except where the United States tribunals are sitting as judges of State law; and the other three, Swayne, Field, and Bradley, held that it is a matter within the powers of the State Legislature to determine the status of woman in the civil state; and that having determined it, the Supreme Court cannot change it. Our judgment was based on the idea that the Fourteenth Amendment only guaranteed against State invasion either of rights expressly given by the Constitution and laws of the United States, or fundamental rights attaching to all citizens as such; and that the right of woman to participate in all civil employments is not a fundamental right beyond the power of the State Legislature to regulate."

In this connection it may be related, that while the opinion of Justice Bradley, so far as it dealt with the merits of the case, doubtless as fully reflected the views held by the judges whose concurrence authenticated the judgment, as it did those entertained by the judges who expressly joined in it, and was thus unanimous on the main question, except as to the Chief Justice, the author happens by chance to know that it had the still higher sanction of the sex most concerned in the decision, through one whose distinguished social position, high character, and eminent good sense entitled her opinion to be regarded as an exponent of its views, in so far, at least, as they may be deemed to emanate from approved intelligence and worth.

In a conversation touching the case and his opinion, while this paper was in course of preparation, Justice Bradley playfully remarked that he was the better satisfied with it because it had the approbation of his wife, who, on having the question presented to her, expressed her views very decidedly and emphatically against the idea of women becoming or practicing as lawyers; and declared that it was abhorrent to all the finer feelings of delicacy that ought to characterize every pure and respectable woman. He looked upon these utterances, he said, as the spontaneous expression of womanhood, and for that reason he thought them of value.

As this fact, hitherto remaining a social secret, has much public interest as an incident of the case, and special significance for the ladies, Justice Bradley has considerately consented that it may be stated, kindly undertaking to answer to Mrs. Bradley for the allusion.

court which were stated by Mr. Justice Field in the Slaughter-House cases. And it was declared that no principle was established by the decision, because it did not touch upon the great social question lying at the foundation of the proceeding —the right of women—under the Constitution of the United States, as amended—to engage generally in the professions and occupations of civil life—but only decided the question of the effect of the Fourteenth Amendment upon the *status* of the petitioner as a citizen of a State.

By this dissent the Chief Justice revealed no new judicial conviction nor political sympathy; but his non-concurrence with Justices Swayne, Field, and Bradley may be considered as equivalent to an assertion of the rights and relations which they denied.

Magnitude of the Issues Decided.

We have now reviewed the leading cases in the record of the late Chief Justice as fully as the purposes of a popular article would admit of, referring only to others of almost equal importance which it has been impossible to notice; and it is unhesitatingly submitted to his countrymen that none of his predecessors were ever called upon to consider questions so grave, so pervading and far-reaching in their consequences, as some of those here presented—questions which go to the foundation and structure of the government, and touch its very right to exist; which led to its origin, have attended its progress, and will pursue its future—questions which proceed not alone from union and peace, with which all our judges are more or less familiar, but grow out of the conditions of disunion and war, and affect society and the people in their dearest interests and most sacred rights—those exposed to danger and liable to be trampled upon and extinguished in times of public peril.

Singular Good Fortune of the Chief Justice.

It was the great good fortune of the Chief Justice to survive until all the issues of the war were settled, and to participate personally in their determination; and the impartial manner in which he passed upon them—so far as man may be impartial—condemning, as we have seen, in a notable instance,

one of the most conspicuous measures of his own administration of a department of the government, is the highest evidence of his devotion to justice and fidelity to the country, and the best illustration of his noble qualities as a freeman intent upon preserving the rights of freemen. *Magistratus indicat virum.*

Future Value of His Adjudications and Example.

His opinions will largely control political questions in future republics, and form the chief bulwark of the people in seasons of danger, as they are mainly directed to the discussion and elucidation of principles entering into the civil polity of such governments, and particularly affecting their administration in time of war; and they must necessarily be in many instances, from the peculiar nature of the cases considered, sole precedents in point. They will be cited abroad and studied at home with equal profit to the profession, benefit to the bench, and advantage to the people. And should those who come after him seek a mould in which to cast judicial composition, or a type upon which to form judicial character, they may rest upon his writings, and build upon his virtues. And should ambition further pursue the secret of high career, and ask a chart of judicial life, it may still be pointed to the vacant chair of the Chief Justice, and receive for answer the matchless reply which Euripides relates was made to Zeno by the oracle at Delphi, upon his inquiry in what manner he should live—"That question should be addressed to the dead."